Filed 7/21/20 P. v. Duncan CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SCOTT EDWARD DUNCAN, Defendant and Appellant.	E070373 (Super.Ct.No. RIF1600312) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed with directions.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Amanda L. Lloyd, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Scott Edward Duncan of premeditated first degree murder (Pen. Code, § 187, subd. (a))[1] and found true an associated weapons enhancement (§§ 1192.7, subd. (c)(23), 12022, subd. (b)(1)). He was sentenced to 26 years to life in prison. On appeal, he argues that there was not sufficient evidence to support the finding of premeditation and deliberation. We conclude otherwise and affirm the conviction.

Duncan also challenges the constitutionality of various fines and fees that were imposed without a determination of his ability to pay. We conclude that this claim was forfeited as to the cost imposed for the presentence probation report, and as to the remainder any error was harmless. We strike the order of presentence incarceration costs, however, as unauthorized. We further conclude that Duncan is entitled to one additional day of actual custody credit. We do not address Duncan's challenge about victim restitution because we conclude that the issue was forfeited.

BACKGROUND

A. *The Missing Person and Discovery of the Body*

On January 20, 2016, Sharon T. reported to police that John D., a person who lived on her property, was missing.[2] John had lived in a mobile home on her property for approximately four months, and Sharon had seen him nearly every day. On the day that Sharon reported him missing, sheriff's deputies searched Sharon's property around

---

[1] Further unlabeled statutory references are to the Penal Code.

[2] We refer to the victim and witnesses by their first names, with or without last initials, to preserve their anonymity. (Cal. Rules of Court, rule 8.90(b).) No disrespect is intended.

John's mobile home and did not find John or any evidence that a struggle or a crime had occurred.

While John lived on that property, he introduced Sharon to Duncan, a friend of his, whom Sharon saw a total of three times. The last time Sharon saw John alive was early in January 2016. He and Duncan were working on hooking up a car trailer to John's vehicle. The next day she saw Duncan driving John's truck while wearing John's hat. Duncan told Sharon that John was resting.

On January 22, 2016, Duncan called Larry S., a mutual friend of Duncan's and John's, and told Larry that he had killed John. Duncan explained that he had wrapped John's body in a rug, and he described where on Sharon's property he had placed the body and how he had hidden it. Duncan said that John had been "riding him," so he and John had gotten into a "big argument and into a fight" and that "it just got out of hand."

Larry called Sharon immediately after that phone call and told her where to look for John's body on her property. Sharon confirmed that the body was there. Larry and Sharon both called the police.

Law enforcement responded to the calls and located John's body behind some garages and hidden underneath plywood, cardboard, and tumbleweeds. The upper portion of John's body was covered in a jacket, and the remainder was rolled up in something that looked like Astroturf. The body was located in a shallow indentation that appeared to have been minimally dug out. A small shovel and a homemade axe were

found near the body. Sometime later, Sharon's son found a hammer with blood on it. The parties stipulated that blood found on the hammer and the axe belonged to John.

B. *Defendant's Testimony—The Killing*

Duncan testified on his own behalf and admitted to killing John. He claimed to have been in fear for his own life. Duncan and John had known each other for approximately 10 years. John was approximately 15 years older than Duncan, shorter than Duncan, and approximately 100 pounds lighter. John and Duncan had both served in the military, and John had combat experience.

Late in the evening on January 15, 2016, Duncan and John went to John's residence, and both men smoked methamphetamine and marijuana. After being awake all night, the men hooked up a car trailer to John's vehicle so that they could run an errand. John became frustrated, and Sharon walked up while they were hooking up the car and the trailer. Duncan and John left to run the errand but later abandoned it, and the two argued on the way back to John's.

At John's, both men smoked more methamphetamine, and Duncan smoked marijuana. While inside the house, John became "pissed off" and accused Duncan of stealing and breaking various items in the mobile home. John went outside to work on the trailer, and Duncan followed him shortly thereafter. John made various statements that made Duncan believe that John was threatening his life and the lives of Duncan's family. John had a knife hanging around his neck on a lanyard, and there were other weapons around the property of which Duncan was aware. John faked a punch in

Duncan's direction, which caused Duncan to fall backward over a milk crate. John laughed and warned Duncan that "next time it will be for real."

John continued to work on the trailer or the truck with a pipe wrench, and he then "crept down" and "came at" Duncan fast from a distance of approximately six feet. Duncan "panicked," grabbed a hammer that was within arm's reach, and struck John in the head with it.[3] John fell to the ground. Duncan looked down, noticed that John was holding a pipe wrench, grabbed the pipe wrench, and hit John three times in the head with it. Duncan then "walked away." Duncan looked back and saw John (who was on the ground and not standing) taking the knife around his neck out of the sheath, so Duncan went back to John, grabbed the knife from John, and sliced it across John's throat. Duncan feared for his life throughout this encounter. Duncan was particularly wary of being physically attacked because he had been attacked by at least six men in jail years before.

After slicing John's throat with the knife, Duncan walked away again and went inside because he thought that the threat had abated. Duncan briefly looked for his cell phone, "sat down for a minute in a corner," prayed, and cried. Duncan walked back outside to look for his phone and noticed John's hand moving. John was still lying on the ground. Duncan once again panicked and felt threatened, so he grabbed a nearby axe and struck John with the axe twice. John appeared dead.

---

[3] The hammer was referred to as either a hammer or a mallet throughout the trial. For the sake of simplicity and consistency, we refer to it as a hammer only.

C. *Forensic Pathologist*

John suffered over 20 separate injuries from blunt and sharp objects.[4] All of the injuries sustained were on John's head and neck. The cause of death was a combination of blunt impact and sharp injuries to the head and neck. The pathologist was unable to identify which specific injury killed John. The pathologist opined that John's heart was still beating when he suffered an injury to his spinal cord that was inflicted from the large "chop injury to the neck" that was consistent with being caused by an axe. John did not have any injuries on his hands. Injuries on a deceased's hands generally indicate that the deceased was "actively involved in defending themselves."

DISCUSSION

A. *Sufficient Evidence of Premeditation and Deliberation*

Duncan contends that there was insufficient evidence showing that he acted with deliberation and premeditation. We disagree and conclude that "there is ample, uncontradicted direct evidence from [Duncan's] own [testimony] and conduct of premeditation and deliberation." (*People v. Sandoval* (2015) 62 Cal.4th 394, 425 (*Sandoval*).)

"A murder that is premeditated and deliberate is murder in the first degree." (*People v. Jurado* (2006) 38 Cal.4th 72, 118 (*Jurado*); § 189, subd. (a).) "'In this context, "premeditated" means "considered beforehand," and "deliberate" means "formed

---

[4] The pathologist listed "20 separate injury categories" that were found on the head and neck. Those categories included some injuries that were grouped together, such as external and internal injuries that coincided with one another like those on the outside of the head and the corresponding internal head injuries.

or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'"'" (*Jurado*, *supra*, at p. 118.) "A reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing." (*Ibid*.; *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*).) These guidelines—referred to as the *Anderson* factors—"are descriptive and neither normative nor exhaustive," so "reviewing courts need not accord them any particular weight."[5] (*People v. Halvorsen* (2007) 42 Cal.4th 379, 420; *Rivera, supra,* 7 Cal.5th at p. 324.)

In the present case, the manner of killing in particular supports a finding of premeditation and deliberation. Duncan admitted using four different weapons in committing this killing. Regardless of whether Duncan had time to reflect before picking up the hammer (the first weapon), Duncan certainly had time to reflect before using each of the three subsequent weapons, particularly given that he walked away from John in between using the second and third weapons and then again between using the third and fourth weapons. Moreover, this killing occurred over a prolonged period—it lasted at least more than one minute based on Duncan's account. In that time, Duncan had time to

---

5 "Upon a challenge to the sufficiency of evidence for a jury finding, we '"'"review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."'"' [Citation.] 'The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.'" (*People v. Rivera* (2019) 7 Cal.5th 306, 323-324 (*Rivera*).)

walk away from the victim twice and to return and use different, more effective weapons. (See *People v. Potts* (2019) 6 Cal.5th 1012, 1028 (*Potts*) ["The manner of the killings also supports a finding of premeditation and deliberation. The attack—involving multiple weapons, numerous stabs and slashes, and, apparently, a knife-sharpening interlude—was undoubtedly 'prolonged'"]; *Sandoval*, *supra*, 62 Cal.4th at p. 425 ["The fact that the manner of killing is prolonged also supports an inference of deliberation"]; *People v. Streeter* (2012) 54 Cal.4th 205, 244 [the defendant's acts that "occurred in stages" demonstrated premeditation and deliberation].)

The evidence of premeditation and deliberation is particularly strong between the use of the third and fourth weapons—the knife and the axe. Duncan, by his own admission, left the outside area in which John was lying on the floor and sat down inside (after briefly attempting to locate his cell phone), where he cried and prayed. One minute later, Duncan returned to the area where John was located and struck John with an axe twice. The jury was free to disbelieve Duncan's testimony that he did so because he feared that John somehow posed a threat to Duncan's life in that moment. (*People v. Elize* (1999) 71 Cal.App.4th 605, 610 [jury free to disbelieve the defendant's testimony about his intent].) Instead, from this evidence, the jury could have reasonably inferred that Duncan chose to strike John with an axe in his throat to ensure that John died because the attacks with the other three weapons had not yet succeeded in killing him.

From the numerous weapons used in this killing, the intervals taken in between using some of the weapons, and the prolonged nature of the attack, there was sufficient

evidence from which the jury could reasonably infer that Duncan had ample time to consider and reflect on the fact that he was killing John and on what weapon would best accomplish that goal. "A theory that a person killed in a fit of rage is undermined by proof that, after ample opportunity for reflection, the person decided that continuing a violent attack was appropriate." (*Potts, supra*, 6 Cal.5th at p. 1029.)

Duncan claims that evidence of the manner of the killing alone is insufficient to support a finding of premeditation and deliberation. He claims that "[i]t is well-settled that the mere brutality of a killing cannot furnish the requisite evidence of premeditation and deliberation." Assuming for the sake of argument that this is true, the premeditation and deliberation finding is supported by many more aspects of the manner in which this killing was effectuated than the "mere brutality" of it. The manner of this killing involved four different weapons that were chosen over a prolonged period to be used against a substantially smaller victim who fell to the ground after the first blow to his head by the first weapon and never stood up again. Regardless of brutality, this is sufficient evidence to support a finding of premeditation and deliberation.

In any event, in addition to the manner of the killing, the jury could reasonably infer from the circumstances of the attack that Duncan developed a motive to kill John. Duncan argues that "the record is devoid of any facts regarding the relationship between [Duncan] and [John] that would constitute evidence of a motive for [Duncan] to kill [John] and support a finding of premeditation." However, the existence and nature of the preexisting relationship between the two men is not the only type of motive evidence that

can be considered. That evidence would only support an inference about Duncan's motive before the attack started. Regardless of the men's prior relationship and whether Duncan possessed a motive when he first attacked John, the jury could reasonably infer from the circumstances of the attack that Duncan developed a motive to kill John during the attack. During the attack, the relationship between the men changed from longtime friends to attacker and victim and John consequently becoming a potential witness and accuser of Duncan's.

From the testimony of both Duncan and the forensic pathologist that John was still alive when he was struck with the axe in his neck, the jury could have reasonably inferred that Duncan returned with the axe to finish the job of killing John to avoid being captured and punished for attacking John with multiple weapons. Duncan's testimony about being previously attacked in jail tends to show that the motive could have been the avoidance of capture and punishment for the attack. The jury could reasonably infer that Duncan wanted to avoid being incarcerated again at any cost, including by killing John, who would have been able to identify Duncan as his attacker had John survived. (*People v. Stitely* (2005) 35 Cal.4th 514, 532 ["the jury could reasonably infer from [a prior accuser's] rape accusation that the defendant killed [the victim] to 'cover up' the sexual assault, and to prevent her from reporting the crime as [the prior accuser] had done"]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1292 ["the jury could conclude that [the] defendant strangled [the victim] and cut her throat, and that [the defendant's] motive was to avoid detection"].) This inference is further supported by the lengths Duncan took to

conceal John's body after the killing—rolling the body in Astroturf, digging a shallow grave for the body, and covering the wrapped body with plywood, cardboard, and tumbleweeds.

In sum, we conclude that there is overwhelming evidence to support the jury's finding that Duncan committed a premeditated and deliberate murder. We therefore affirm the first degree murder conviction.

B. *Victim Restitution*

Duncan contends that the amount of victim restitution that he was ordered to pay to the Victim Compensation Government Claim Board (the Board) for a claim from John's wife amounts to an unauthorized sentence because it might duplicate the amount of victim restitution that he was ordered to pay directly to John's wife. We conclude that this argument is forfeited.

As a general rule, "all 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review." (*People v. Smith* (2001) 24 Cal.4th 849, 852.) This rule applies to the imposition of restitution fines under section 1202.4. (*Smith, supra,* at pp. 852-853; *People v. Tillman* (2000) 22 Cal.4th 300, 302-303.) A narrow exception to this forfeiture rule exists for """unauthorized sentences" or sentences entered in "excess of jurisdiction."" (*Smith,* at p. 852.) Under this exception, appellate intervention is only appropriate when the errors are purely legal and do not require reference "to factual findings in the record or remanding for further findings." (*Ibid.*)

Here, the trial court ordered Duncan to pay $6,621 in victim's restitution to John's wife (§ 1202.4, subds. (a)(1), (f)), which is the amount that the probation officer recommended. When the probation officer made her recommendation, the Board had not paid John's wife any money on the claim she had made with the Board. The probation officer therefore recommended that restitution to the Board "be set as to be determined." At sentencing, the prosecutor informed the court that he had an update about the amount to be paid to the Board: "It is $5,129 in addition to what the [c]ourt just read." The court ordered Duncan to pay that amount to the Board (§ 1202.4, subds. (a)(1), (f)). Duncan did not object.

Because Duncan's argument cannot be evaluated without analysis of the facts and evidence, we must conclude that Duncan forfeited the argument by failing to raise it in the trial court. It is not a pure question of law and consequently is not excepted from the forfeiture rule. (*Tillman*, *supra*, 22 Cal.4th at p. 303.) Because Duncan failed to object at sentencing to the award to the Board, we conclude that this argument is forfeited.[6]

---

[6] We further reject Duncan's request that we review this issue based on his counsel's purported ineffectiveness by failing to object. No reason was given at sentencing as to why counsel failed to object to the amount awarded to the Board. The prosecutor provided defense counsel with the updated information about the Board before the hearing. Defense counsel could have refrained from objecting because he was told or otherwise knew that the award to the Board did not duplicate any amount awarded to John's wife directly. Because this is a possible satisfactory explanation for defense counsel's failure to object, this claim of ineffective assistance of counsel is more appropriate for a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

C. *Hearing on Ability to Pay Fines, Fees, and Restitution*

At sentencing, the court ordered Duncan to pay a $70 court operations and facilities fee (§ 1465.8, subd. (a)(1); Gov. Code, § 70373), $1095 for the cost of the presentence probation report (§ 1203.1b), and a $300 restitution fine (§ 1202.4, subd. (b)) with a corresponding suspended $300 parole revocation fine (§ 1202.45, subd. (a)). Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), which was decided while this appeal was pending, Duncan argues that imposition of these fines and fees without a determination of his ability to pay violated his due process rights.[7] He also argues that imposition of these fines and fees without an ability to pay hearing violated the Eighth Amendment's prohibition against excessive fines. We conclude that Duncan forfeited any argument about the cost of the presentence probation report, and we further conclude that any error with respect to the other fines and fees was harmless.[8]

Dueñas held that defendants have a due process right under the federal and state Constitutions to a hearing on their ability to pay court operations and facilities fees. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.) In addition, "to avoid serious constitutional

---

7 The Supreme Court has granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844 [2019 Cal. Lexis 8371], to decide whether a court is required to "consider a defendant's ability to pay before imposing or executing fines, fees, and assessments."

8 The People argue that the restitution fine is punitive in nature and should be analyzed under the Eighth Amendment's excessive fines clause, not the due process clause. They contend that the restitution fine is constitutional under the excessive fines clause. Moreover, they argue that even if a due process analysis applies, the fine survives rational basis review and therefore is constitutional. We need not address those arguments, given our conclusion that any error in imposing the restitution fine was harmless.

questions" raised by the statutory restitution scheme, the court must stay execution of the mandatory restitution fine unless the court determines that the defendant has the ability to pay it. (*Id.* at p. 1172.) The same court that decided *Dueñas* has since clarified that, at the ability to pay hearing, defendants bear the burden of showing their inability to pay, and the court "must consider all relevant factors," including "potential prison pay during the period of incarceration to be served by the defendant[s]." (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490-491.) This court has already held that a defendant sentenced before *Dueñas* cannot have forfeited a due process challenge to a minimum restitution fine or to a court operations and facilities fee. (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1030-1035 (*Jones*).)

The cost of the presentence probation report is a different matter. At the time of Duncan's sentencing, section 1203.1b permitted the court to consider Duncan's ability to pay in assessing that cost. (§ 1203.1b, subd. (b) ["The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative"].) Duncan therefore could have objected at sentencing that he did not have the ability to pay the $1,095 cost for the presentence probation report. He did not. This argument is therefore forfeited. (*People v. Taylor* (2019) 43 Cal.App.5th 390, 399 (*Taylor*) [challenge to restitution fine above the minimum forfeited at pre-*Dueñas* sentencing hearing because the court could have considered the defendant's objection on the basis of inability to pay at the time of sentencing].) Also, the People correctly point

out that the $1,095 was erroneously omitted from the abstract of judgment. We direct the trial court to include it in the amended abstract of judgment to be prepared on remand.

With respect to the remainder of the fines and fees, we conclude that any error in imposing these fines and fees without an ability to pay hearing was harmless beyond a reasonable doubt.[9] (*Jones*, *supra*, 36 Cal.App.5th at p. 1035.) "[E]very able-bodied" prisoner must work while imprisoned. (§ 2700.) Wages in prison range from $12 to $56 per month, depending on the job and skill level involved. (Cal. Code Regs., tit. 15, § 3041.2, subd. (a)(1); see also Cal. Code Regs., tit. 15, § 3040, subd. (k) ["An inmate's assignment to a paid position is a privilege dependent on available funding, job performance, seniority and conduct"]; *People v. Cervantes* (2020) 46 Cal.App.5th 213, 229 (*Cervantes*) [recognizing that an inmate's assignment to a paid position is a privilege].) Fifty percent of Duncan's wages and trust account deposits will be deducted automatically to pay the restitution fine, plus another 5 percent for the administrative costs of that deduction. (§ 2085.5, subds. (a), (e); Cal. Code Regs., tit. 15, § 3097, subd. (f).)

According to the probation report, Duncan was 40 years old when he was sentenced. That report does not contain any information about his health status, education, or work history. However, the nature of the killing and the manner in which the body was moved and concealed demonstrate that Duncan is able-bodied and capable

---

9 Neither party argues about the mandatory parole revocation fine imposed under section 1202.45, which is statutorily stayed until Duncan is granted parole that is later revoked.

of earning prison wages. He will owe at most $385, including the fees ($70), the restitution fine ($300), and the administrative costs of deducting the fine (5 percent of $300, or $15). Assuming that Duncan earns the minimum monthly wage in prison ($12) and does not have any money added to his trust accounts, he will pay off that total amount in approximately 32 months, or less than three years. Duncan's sentence far exceeds three years. We therefore conclude that the failure to conduct an ability to pay hearing for these fees and fines was harmless beyond a reasonable doubt.

D. *Actual Custody Credit*

A criminal defendant is entitled to actual custody credit for "all days of custody" spent in jail before sentencing (§ 2900.5, subd. (a)), "including partial days," (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48), so long as that custody is "attributable to proceedings related to the same conduct for which the defendant has been convicted" (§ 2900.5, subd. (b)). The trial court awarded Duncan 819 days of actual custody credit. Duncan, however, spent 820 days in custody—from January 22, 2016, to April 20, 2018.

According to the probation report, Duncan was taken into custody on January 22, 2016, at 11:40 p.m. to be questioned about the killing of John. He was arrested the next day, on January 23, 2016. Duncan seeks credit for that one additional day before he was arrested.

Relying on *People v. Adams* (2018) 28 Cal.App.5th 170, 180 (*Adams*), the People contend that the calculation of custody begins on the date of arrest. *Adams* and the cases cited therein do state that proposition. (*Ibid.*; *People v. Rajanayagam*, *supra*, 211

Cal.App.4th at p. 48 ["Calculation of custody credit begins on the day of arrest and continues through the day of sentencing"]; *People v. Morgain* (2009) 177 Cal.App.4th 454, 469 ["A defendant is entitled to credit for the date of his arrest and the date of sentencing"].) However, none of those cases, nor any of which we are aware, presents the issue of whether prearrest custody counts toward the actual custody credit calculation. These cases therefore do not support the proposition that prearrest custody should be treated differently from postarrest custody for purposes of calculating actual custody credits.

The statute does not make that distinction. The only distinction it makes is based on whether the custody was attributable to conduct related to the offense of conviction. (§ 2900.5, subds. (a), (b).) No one disputes that the custody was related to Duncan's arrest for killing John. Under the plain language of the statute, the one day on which Duncan was in custody before he was arrested therefore counts toward calculation of his actual custody credits.

For these reasons, we conclude that Duncan is entitled to one additional day of custody credit for the one partial day that he spent in custody before his arrest. The abstract of judgment should be correct to reflect 820 days of actual custody credit.

E. *Presentence Incarceration Costs*

The trial court ordered Duncan to pay a total of $1,500 in presentence incarceration costs under section 1203.1c. That section allows the court to order a defendant to pay for reasonable costs of incarceration, subject to ability to pay, if the

defendant is "ordered to serve a period of confinement in a county jail, city jail, or other local detention facility as a term of probation or a conditional sentence." (§ 1203.1c, subd. (a).) As the People correctly point out, section 1203.1c does not apply to Duncan, because he was sentenced to prison. (*Cervantes, supra*, 46 Cal.App.5th at p. 229.) We therefore order the court to strike the $1,500 fee for the costs of presentence incarceration.

DISPOSITION

We order the trial court to: (1) strike the $1,500 fee for the costs of presentence incarceration under section 1203.1c, and (2) prepare an amended abstract of judgment, including the $1,095 for the presentence probation report and indicating 820 days of actual custody credit. The amended abstract of judgment shall be forwarded to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MENETREZ
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.